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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No. 744

UNITED STATES OF AMERICA,
Petitioner,

vs.

WRIGHTWOOD DAIRY COMPANY,
Respondent.

RESPONDENT'S ANSWER AND BRIEF IN SUPPORT THEREOF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ALVIN E. STEIN,
Attorney for Respondent.

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RESPONDENT'S ANSWER AND BRIEF IN SUPPORT THEREOF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Answering the Petition of United States of America for a writ of Certiorari to the United States Circuit Court of Appeals, for the Seventh Circuit, the Respondent Wrightwood Dairy Company, respectfully states that the writ of certiorari should not issue out of this Court to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered on October 27, 1941, affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division.

Question Presented.

The question is *not* as set forth on page 2 of the petition, "Whether Federal regulation of the price of intra-state

milk sold in competition with inter-state milk *is permissible* under the commerce clause of the Constitution and the Agricultural Marketing Agreement Act of 1937," but rather whether the Respondent, defendant below, who admittedly was engaged solely in intra-state commerce and whose milk was in no wise inter-mingled with milk which crossed state lines, was a handler of milk as defined in Section 8c(1) of the Agricultural Marketing Agreement Act of 1937 and in Section 941.1(a) (4) of Order No. 41, and as such was subject to the applicable provisions of the Act and the Order.

It is not contended by petitioner that the milk handled by the Respondent is in the current of inter-state commerce or directly burdens, obstructs or affects inter-state commerce in such commodity, but it is contended by the petitioner that the Agricultural Marketing Agreement Act of 1937 regulates milk wholly intra-state in character and handling *where the point of impingement of the intra-state transaction is one of competition only.*

Statutes and Order Involved.

Petitioner alleges that the statute involved only Section 8c of the Act of May 12, 1933, (48 Stat. 31) as amended, and as re-enacted and amended in the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937, but we submit that the entire Agricultural Marketing Agreement Act of 1937 is involved, not only Section 8c but also others such as Section 10(i)[1] and Section 10(j).[2]

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[1] Section 10(i) provides that the Secretary of Agriculture shall co-operate with state authorities in order to effectuate the declared policy of said Act and in order to obtain uniformity in the formulation, administration and enforcement of federal and state programs relating to the regulation of the handling of agricultural commodities.

[2] Section 10(j) defines the term "inter-state or foreign commerce."

In order to ascertain the intent of Congress in enacting the Agricultural Marketing Agreement Act of 1937, and prior Acts re-enacted, the Senate and House Committee reports, together with the explanatory statements of members in charge in presenting the bill for passage, become material as the exposition of the legislative intents, which reports and debates were offered in evidence at the trial by Respondent.[3]

Respondent contends that Order No. 41 was not promulgated by the Secretary of Agriculture pursuant to the provisions of the Act and that the Order does not conform to and is contrary to said Act and is otherwise illegal and void, and filed a cross-appeal in the United States Circuit Court of Appeals, but in view of the decision affirming the judgment of the District Court, the Circuit Court of Appeals did not deem it necessary to discuss the errors assigned and dismissed the cross-appeal. (R. 274-275.)

While it is true that "the order was issued after a hearing and findings by the Secretary of Agriculture," we submit the fact to be that the hearing referred to, was not a hearing upon the Order promulgated by the Secretary of Agriculture but upon a proposed marketing agreement and order regulating the handling of milk prepared and proposed by the Pure Milk Association and Chicago Milk Producers Council, Inc. This proposed marketing agreement and order provided that the so-called Chicago, Illinois, marketing area was to include Chicago, Illinois, and all that territory lying within the boundaries of Cook County and Du Page County, Illinois, and the townships of Wheaton, Du Page, Plainfield, Lockport, Homer, Troy, New Lenox, Frankfort and Crete in Will County, Illinois, and the townships of St. John, Ross, North Calumet and

[3] See defendant's exhibits A, B, C and D. (R. 203-217.)

Hobart, in Lake County in the State of Indiana. (See Def's. Ex. 3, pp. 3, 5.)[4]

The Chicago, Illinois marketing area in Order No. 41 covers only the territory within the corporate limits of the cities of Chicago, Evanston, Wilmette, Kenilworth, Winnetka and Glencoe, in the State of Illinois. (R. 11.) A comparison of the proposed marketing agreement upon which a hearing has been held, and the Order No. 41, discloses such a diversity of provisions that it cannot be said that the hearing upon the former was also a hearing upon the latter. The producers and handlers of milk had no opportunity to be heard upon Order No. 41 promulgated by the Secretary. No hearing was held by the Secretary upon the proposed Order 41 pursuant to the provisions of the Act as provided in Sections 8c(3), 8c(4), 8c(9) and 8c(10).[5]

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[4] The record before the Secretary of Agriculture was introduced in evidence as Def's. Ex. 1, 2, 3 and 4. This record has not been reprinted but has been certified to the court in its original form.

[5] Section 8c(3) of the Agricultural Marketing Agreement Act of 1937 provides: "• • • *he shall give due notice of and an opportunity for a hearing upon a proposed order.*"

Section 8c(4) provides: "*After such notice and opportunity for hearing,* the Secretary of Agriculture shall issue an order, if he *find* and *sets forth in such order,* upon the evidence introduced *at such hearing* (*in addition to such other findings as may be specifically required by this section*) that • • • "

Section 8c(9) provides: "Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers • • • to sign a marketing agreement relating to such commodity or product thereof, *on which a hearing has been held,* the Secretary of Agriculture, with the approval of the President determines: • • • "

Section 8c(10) provides: "*No order shall be issued* under this section *unless* it regulates the handling of the

Respondent respectfully directs the Court's attention to the fact that although the Secretary of Agriculture did, on August 28, 1939, promulgate Order No. 41 regulating the handling of milk in the Chicago Area, that during the pendency of this cause the Secretary of Agriculture did, on June 21, 1940, effective July 1, 1940, voluntarily execute and promulgate an Order No. 41, as amended, embracing new and different provisions, to regulate the handling of milk in the Chicago Area, and petitioner admitted the issuance of said amended order in its supplemental motion for summary judgment. (R. 144, 145).

STATEMENT.

In answer to the Complaint of the petitioner, Respondent, as defendant below, filed eleven (11) separate defenses, (R. 84-99, 104) and a supplemental answer (R. 118). Plaintiff's motion to strike the third (3rd) defense was denied and plaintiff's motion to strike the fourth (4th), fifth (5th), sixth (6th), seventh (7th), eighth (8th), ninth (9th), tenth (10th) and eleventh (11th) defenses were sustained. (R. 244.) The failure of the trial court to over-rule the motions to strike said defenses was made the basis of a cross-appeal in the United States Circuit Court of Appeals, Number 7620, but that court, in view of its decision, deemed it unnecessary to discuss the errors assigned and dismissed said cross-appeal. In order to preserve the rights of Respondent herein in the event this petition for certiorari should be granted, a cross-petition for a writ of certiorari to review the dismissal of said cross-appeal has been filed herein.

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commodity or product covered thereby in the same manner as and is made applicable *only to persons* in the respective classes in the industrial or commercial activity specified in, a marketing agreement *upon which a hearing has been held.*"

The evidence shows that the Respondent is a corporation organized under the laws of the State of Illinois; that it purchases and for some time past has purchased, approximately thirty thousand (30,000) pounds of milk a day from approximately seventy (70) producers located within the State of Illinois, and no part thereof is purchased from any producer located outside the State of Illinois; that said milk is processed by Respondent in its plant at Chicago and sold and distributed entirely within the Chicago marketing area within the State of Illinois, and that no portion thereof is intended to be sold or is sold for use outside of the State of Illinois, and that none of Respondent's milk was in any wise physically inter-mingled with milk which had crossed state lines. (R. 245-246.)

The court found as a fact that the defendant in the handling of milk was engaged in intra-state business and was not in the current of inter-state or foreign commerce, and did not directly burden, obstruct or affect inter-state or foreign commerce in milk marketed within the Chicago, Illinois marketing area, and found, as a matter of law, that said order did not apply to the defendant and that the defendant is not a handler of milk as defined in Section 8c(1) of the Agricultural Marketing Agreement Act of 1937 and in Section 941.1(a)(4) of the Order, and is, as such, not subject to the applicable provisions of the Act and of the Order. (R. 246-247).

The court, however, found that the Order was issued by the Secretary in full compliance with the law and that all conditions precedent to the effectiveness of said Order have occurred (R. 245-246). This finding, defendant contended, by way of cross-appeal, was contrary to the law and evidence herein. (R. 259-261.)

ARGUMENT AGAINST GRANTING THE WRIT.

I.

The decision of the Court below followed the settled law as to which there is no conflict.

It is conceded that the Respondent in the handling of milk was engaged in intra-state business and was not in the current of inter-state or foreign commerce. Nevertheless, petitioner contends that Respondent is a handler and is subject to the provisions of the Agricultural Marketing Agreement Act of 1937 and of the Order, and bases its entire contention upon the assumption that under the law *one and only one* factual element is essential to subject the milk dealer whose operations are wholly intra-state in character to the provisions of the Order promulgated under said Act if the handler *competes* with other handlers of milk which cross State lines.

This contention presents a dangerous and revolutionary construction of the United States Constitution which would enable the Federal Government to control every legal enterprise, every occupation and business merely by showing that the product thereof is in competition with similar products which cross State lines. Such a restriction would reach all enterprises and transactions which were in competition with those of other States. The authority of the Federal Government would embrace particularly all activities of the people, and the authority of the State over its domestic affairs would exist only by sufferance of the Federal Government. There would be no limit to Federal power, and the States and the people would be effectively deprived of

their rights theretofore reserved to themselves and guaranteed to them under Article 10 of the Amendments to the Constitution of the United States.[6]

We shall hereinafter show that plaintiff's contention is the result of wishful thinking and finds no support either in the provisions of the United States Constitution, the Acts of Congress, or in the decisions of the Supreme Court of the United States.

1. Congress did not intend in passing the Agricultural Marketing Agreement Act of 1937 and prior Acts to assume control of purely intra-state transactions, and the Act itself contains no such provision.

A brief history of the prior Acts which were re-enacted in the Agricultural Marketing Agreement Act of 1937 and the interpretation and construction of the Courts of these Acts fully sustain this contention.

(a) The Agricultural Adjustment Act of 1933 did not apply to all transactions where the products were produced and sold within the same state. (Title 7 U. S. C. A., Sec. 601, et seq.)

The Agricultural Adjustment Act of 1933, Section 608(3) authorized the Secretary of Agriculture "to issue licenses permitting processors, associations of producers and others to engage *in the handling in the current of inter-state or foreign commerce* of any agricultural commodity or product thereof or *of any competing commodity or product thereof.*" The Federal Courts in considering said Act uniformly held that a milk dealer purchasing all of his supply of milk in his State and selling all of said milk in said State was engaged in intra-state commerce and was not

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[6] *United States* v. *Butler*, 297 U. S. 1, 80 L. Ed. 477.
Schechter v. *United States*, 295 U. S. 495, 542.

subject to the control of the Federal Government under said Act.[1]

(b) Congress, in 1935, in amending the Act of 1933 did not intend that the provisions shall apply to transactions where the products were produced and sold within the same state.

On May 27, 1935, the Supreme Court unanimously rendered the decision in *Schechter* v. *United States*, 295 U. S. 495, 542. At that time Congress was in session and was then considering the amending of the Agricultural Adjustment Act of 1933 to clarify doubtful legal provisions in view of the decision in the *Schechter* case. This is made evident by the report of the committee submitted to the Senate on July 3, 1935, and the report to the House of Representatives on June 15, 1935, (R. 203, 204, 211) wherein it was stated that the amendments to the Agricultural Adjustment Act were needed *inter alia* "to insure that the program will be carried out within the limits of the powers given Congress under the Constitution."

Both Senate and House reports provide, among other things:

> "The powers to be exercised under the proposed bill are confined within the limitations upon the Federal authority over interstate commerce as expressed by the Supreme Court in the *Schechter* case and other cases. (R. 207-211) * * *

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[1] *Douglas* v. *Wallace*, 8 F. Supp. 379, 383.
United States v. *Greenwood Dairy Farms, Inc.*, 8 F. Supp. 398, 400.
Royal Farms Dairy, Inc. v. *Wallace*, 8 F. Supp. 975, 977, 979.
Edgewater Dairy Company, Inc. v. *Wallace*, 7 F. Supp. 121, 122.
Allen v. *Wallace*, 12 F. Supp. 515.
Berdie v. *Kurtz*, 75 F. (2d) (C. C. A. 1935) 898.

"The scope of orders under the proposed section 8c is limited to the regulation of the handling of the specified commodities in the current of interstate or foreign commerce, or to the handling thereof which *directly* burdens, obstructs or affects interstate or foreign commerce in such commodities or products thereof. Section 8(2) of the Agricultural Adjustment Act now authorizes the Secretary of Agriculture to enter into marketing agreements with processors and others engaged in the handling of any agricultural commodity or product thereof *'in competition with'* interstate or foreign commerce. This phrase has been *omitted* from the proposed section 8c(1) of the bill which deals with orders, as well as from the proposed section 8b, which deals with marketing agreements; *because the proposed language makes it clear that the full extent of the Federal power over interstate and foreign commerce and no more is intended to be vested in the Secretary of Agriculture in connection with orders* • • •. (R. 207-208)" (Italics ours.)

It will be noted that Congress intentionally omitted the phrase "in competition with" inter-state or foreign commerce from the Marketing Agreement Act of 1935 to avoid any possible construction that any product merely "in competition with" products in interstate or foreign commerce be deemed to come within the purview of the Marketing Agreement Act of 1935. This Act was subsequently re-enacted as a part of the Agricultural Marketing Agreement Act of 1937 without change.

That this was the deliberate intent of Congress is further evidenced by the debates in the Senate wherein it appears that those in charge of the Bill in the Senate emphasized and reiterated that the Bill was not intended to control any phase of the milk situation where the milk is produced

and where it is sold within the same State and said Bill was passed upon that distinct understanding.[8]

Committee reports and explanatory statements of members in charge made in presenting the Bill for passage are competent as an exposition of the legislative intent.

Duplex Printing Press Co. v. *Deering*, 254 U. S. 443, 475, 65 L. Ed. 349, 360.

Here, like in the *Duplex Printing Press Co.* case, it definitely appears that Mr. Senator Smith, who submitted the committee report to the Senate and who had the Bill in charge, had definitely agreed with the leading Senators on the floor that the Act was not intended to cover a situation where milk is produced in the State and sold within that State, and it was agreed that it was the sense of the Senate that the Government would have no right or control of any phase of the milk situation under such circumstances. This was the final word of the Senate on the subject and borrowing the language from the opinion in the *Duplex Printing Press Company* case, 254 U. S. 443, 475, 65 L. Ed. 349, 360,

> "was uttered under such circumstances and with such impressive emphasis that it is not going too far to say that except for this exposition of the meaning of the section, it would not have been enacted in the form in which it was reported."

(c) The provisions of the Agricultural Adjustment Act of 1935 do not apply to transactions where the products were produced and sold in the same state.

The provisions of the Act have no application to a handler of milk who admittedly engaged solely in intra-

[8] Excerpts of these debates were admitted in evidence and are set forth in the record on pages 215-216.

state business. The mere fact that the products Respondent handles may be in competition with like products which cross state lines does not make it subject to the Act. By Section 8c(1) the Secretary of Agriculture is authorized to issue orders "provided *only* such handling of such agricultural commodity or product thereof as is in the current of inter-state or foreign commerce, or which directly burdens, obstructs or affects inter-state or foreign commerce in such commodity or product thereof." We submit that Congress, by use of the word "only" in the foregoing sections, clearly emphasized its determination that the Secretary of Agriculture was limited in the issuing of orders to such handling of products which actually were in the current of inter-state or foreign commerce which *directly* burdened, obstructed or affected inter-state commerce.

As heretofore shown Congress expressly eliminated the phrase "in competition with" contained in the earlier law and substituted the language found in the present law.

Where a revised statute or one enacted for another omits provisions contained in the original act, the parts omitted cannot be kept in force by the construction but are annulled.

In *United States* v. *Stroop*, 109 F. (2d) 891 (C. C. A. Ohio (1940)), the Court said at page 893:

> "The Congress must be presumed to know the language in former Acts and have judicial construction placed upon them, and if in subsequent legislation on the same subject different language is used, there is a presumption of a manifest intention to change the law. *Johnson* v. *United States*, 225 U. S. 406, 416, 56 L. Ed. 1142."

To the same effect, see:
U. S. Board of Commissioners, 26 F. Supp. 270, 274.
Stewart v. *Kahn*, 78 U. S. 493, 20 L. Ed. 176, 178.

It follows that the Courts must in order to give effect to the declared intent of Congress, construe the Act to mean that mere competition by an intra-state handler with similar products crossing state lines does not subject the handler to Federal regulation.

Congress clearly recognized that the State would control agricultural commodities involved solely in intra-state business and that it had no jurisdiction over such transactions. However, in order to secure uniformity in the enforcement of Federal and State programs regulating the handling of agricultural commodities, it enacted Section 10(i).

This Section provides that the Secretary of Agriculture, upon request of the duly constituted authorities of any *State*, is directed to confer with and hold joint hearings with the authorities of any State and to issue complementary orders to orders or other regulations issued by such State authorities.

In the committee reports in the Senate and in the House at the time of the passage of this section it was expressly pointed out that:

> "Notwithstanding the authorization of cooperation contained in this section, there is nothing in it *to permit or require the Federal Government to invade the field of the States*, for the limitations of the act and the Constitution forbid regulation in that field, and this provision does not indicate the contrary • • •. Each sovereignty operates in its own sphere." (R. 210).

The Supreme Court of the United States has fully recognized and sustained the validity of various State laws regulating the processing of milk pertaining to intra-state business in contra-distinction to interstate transactions.[10]

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[10] *Nebbia* v. *New York*, 291 U. S. 502, 78 L. Ed. 940.

Congress has no power to control all local enterprises under the pretext that it had an indirect effect on inter-state commerce merely because one was in competition with the other or that prices of the products in the industry might be affected.[11]

(d) The Agricultural Marketing Agreement Act of 1937 re-enacted all the provisions of the Agricultural Adjustment Act of 1933 and 1935, and its provisions do not apply to transactions where the product is produced and sold within the same state.

Section 10(j) defining inter-state or foreign commerce was added to the Act of 1935. There is nothing in the definition which in any wise supports petitioner's theory, that merely because the milk handled by the Respondent is in competition with other milk which has crossed State lines defendant was in any wise engaged or directly interfered with or obstructed inter-state commerce.

Had Congress intended that mere competition with inter-state products shall subject a purely intra-state transaction to Federal regulation, it would have stated so in plain and unmistakable terms. It would have retained and perhaps amplified the phrase "in competition with" in the subsequent enactments, instead of purposely omitting the same. It is evident that Congress did not so provide.

The Courts cannot legislate for Congress and read into the law something which Congress itself did not include

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Milk Control Board v. *Eisenberg Farm Products*, 306 U. S. 346, 83 L. Ed. 752.

Hegeman Farms Corp. v. *Baldwin*, 293 U. S. 163, 79 L. Ed. 259.

[11] *Schechter* v. *U. S.*, 295 U. S. 495, 542.

Carter v. *Carter Coal Co.*, 298 U. S. 238.

Heisler v. *Thomas Colliery Co.*, 260 U. S. 245, 259.

therein, and which as a matter of fact, Congress expressly intended to exclude.[12]

II.

The case presented by the petitioner and the question involved does not necessitate review and decision by this Court.

1. It is contended by petitioner that the decision below conflicts with *U. S. v. Rock Royal Co-Operative, Inc.*, 307 U. S. 533. In that connection the United States Court of Appeals below held that this decision did not sustain petitioner's contention.[13]

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[12] *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 649,

> "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable, they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions."

[13] The Court said; "We are not convinced that the case sustains his position. The Supreme Court did not have before it the issue of the applicability of an order to a distributor whose activities were wholly intrastate. In that case the court said (p. 541): 'The state order was eliminated from consideration on the understanding, not questioned here, that the milk of all four defendants is covered by the Federal Order, if valid.' Further on in the opinion the court said (p. 568): 'There is no challenge to the fact that the milk of all four defendants reaches the marketing area through the channels of interstate commerce.' It is true that Mr. Justice Reed then said: 'Nor is any question raised as to the power of the Congress to regulate the distribution in the area of the wholly intrastate milk.' From this we believe the Supreme Court did not intend to preclude this important question, now before us, which was not an issue in the case before it." (R. 272.)

Petitioner contends however that one of the defendants in the *Rock Royal* case did challenge the power of Congress to regulate it on the ground that its activities were entirely intra-state and refers to an alleged answer filed by one defendant in the Trial Court. That this defense was expressly *waived* in the Supreme Court is evidenced by the Court's opinion. The appeal there involved two (2) orders, one promulgated by the Secretary of Agriculture and the other under the State Laws of New York. The Court held that these orders were in *pari materia*, but did not pass on the New York order for the reason that "The State order was eliminated from consideration *on the understanding* not questioned here, *that the milk of all four defendants is covered by the Federal order if valid.*"[14]

Aside from the fact that the Supreme Court did not pass upon the question here involved, the evidence in that case differs materially from the facts found in this case. In the *Rock Royal* case two-thirds (⅔rds) of the milk produced in the New York marketing area was found to have actually moved in interstate commerce and that the remaining one-third (⅓rd) produced within the State of New York *was physically and inextricably* intermingled with the interstate milk.[15]

In the present case, however, the Court found that none of Respondent's milk was physically inter-mingled with milk which had crossed State lines, (R. 158) and that over sixty (60%) per cent of the milk in the Chicago Area was produced in Illinois and the remaining milk sold in the Chicago marketing area was produced in Wisconsin, Indiana and Michigan. (R. 158.) In this connection it may be pointed out that the Supreme Court in the *Rock Royal*

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[14] *U. S.* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533, pages 540-541.

[15] 307 U. S. 552-553.

case did not have before it the committee reports of the House and Senate nor the debates in Congress hereinbefore discussed to ascertain the intent of Congress.

The Order promulgated by the Secretary of Agriculture under consideration in the *Rock Royal* case recognized that there was some milk entirely in intra-state commerce over which the Federal Government had no control and which was regulated by the order of the Commissioner of Agriculture and Markets of the State of New York under State Laws and such intra-state handling of milk was expressly excepted from the order.

We submit that the *Rock Royal* case does not conflict with the decision below.

2. It is further contended by petitioner that the decision below is in direct conflict with the decision of the Circuit Court of Appeals in *U. S.* v. *Adler's Creamery, Inc.*, 110 F. (2d) 483, (certiorari denied, 311 U. S. 657).

Aside from the fact that the Court relied upon the inopposite remark made in the *Rock Royal* case, we submit that the facts differ materially from the one here under consideration. In that case it appeared that one-third (⅓rd) of the milk produced for sale in the New York metropolitan marketing area came from States other than New York, and about one-sixth (1/6th) of the milk produced in the State for sale in that marketing area crossed State lines on its way to that market, and that one-half (½) of all the milk produced for sale in that marketing area was actually moved in interstate commerce while being brought to market. There as in the *Rock Royal* case the committee reports and the debates in Congress were not considered, nor the Court's attention called to the fact that Congress had intentionally deleted the words "in competition with" in order to eliminate any possible interpretation of the Act that mere competition might be held

to bring an intrastate transaction within the Federal Commerce power.

The fact that *certiorari* was denied in the *Adler* case by the Supreme Court indicates no expression of opinion by the Supreme Court upon the merits of the case.[16]

3. Petitioner also relies upon several decisions of District Judges, all of which, however, are easily distinguishable either upon the facts or the law.

In *U. S.* v. *Krechting*, 26 F. Supp. 266, the District Judge relied entirely upon *Nebbia* v. *New York*, 291 U. S. 502, to sustain his arbitrary finding that intrastate transactions involving milk necessarily affected and burdened interstate commerce. The Court entirely ignored the fact that the *Nebbia* case involved the right of a State under its police powers to legislate and did not involve the question of interstate commerce.[17] In this connection it may be noted that the Supreme Court has concurrently with the confirming opinion in the *Rock Royal* case sustained the power of the State to legislate in regard to the distribution of milk within the State.[18]

In *United States* v. *Andrews*, 26 F. Supp. 123, relied upon by the petitioners, it appeared that the defendants were

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[16] *Atlantic Coast Line R. Co.* v. *Powe*, 283 U. S. 401-403.

[17] *Douglas* v. *Wallace*, 8 F. Supp. 379, 383.

[18] In *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 570, the Court said: "The power of a State to fix the price of milk has been adjudicated by the Court. • • • It belongs to that category of commodities that for many years has been subjected to a regulatory power of the State." See also *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, where the Court said (p. 351): "Every State police statute necessarily will affect interstate commerce in some degree, but such statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce."

handlers of milk in the Boston area, who either produced or purchased milk from other producers in Massachusetts, and who also bought from other handlers who had received milk from producers outside of Massachusetts, the milk so purchased being *co-mingled* with the local milk and processed at their respective plants in Massachusets. In view of these facts, not found in the case here under consideration, the Judge there granted a temporary injunction.

In *United States* v. *H. B. Hood & Sons,* 26 F. Supp. 672, three (3) defendants were involved, two (2) of them purchased their milk outside of the State and the third one did both an interstate and intrastate business. It claimed exemption as to the intrastate character of its activities which the Court denied on the basis of *Currin* v. *Wallace,* 306 U. S. 1, and the *Shreveport* case, 234 U. S. 342. It is evident that these facts differ materially from those here under consideration.

In *United States* v. *Schwarz,* Civil Action No. 1480, Northern District of Illinois, Judge Barnes, without formal opinion, followed the dictum in the *Rock Royal* case. It does not appear from the opinion to what extent the particular defendant was engaged in interstate activities.

The facts in *Holbrook* v. *Wallace,* Civil Action No. 5811 (D. D. C.) are not available and cannot therefore be discussed.

4. Petitioner contends that the decision below conflicts with the fundamental constitutional doctrine that the power of Congress extends to the control of intrastate acts when necessary to the effective regulation or protection of interstate commerce, and in support thereof, cites various decisions, none of which, as we shall show, sustain its position.

An examination of these cases discloses that the particular intrastate transactions were regulated only because they had a direct effect on interstate commerce and were

closely co-mingled with or related to the interstate commerce.

In the *Shreveport* case, 234 U. S. 342, as in *Railroad Commission of Wisconsin* v. *C. B. & Q. R. Co.*, 257 U. S. 563, the Court merely held that in dealing with common carriers engaged in *both interstate and intrastate commerce*, involving the same trains serving interstate as well as intrastate transportation, Congress has the right to control their intrastate operations in order to prevent unjust discrimination in rates.

In *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 41, relied upon by the petitioner, the Court held that "In view of the actual interstate dealings in cash sales of grain on the exchange, and the effect of the conduct of the sales in futures upon interstate commerce, we find no difficulty • • • in concluding that the Chicago Board of Trade is engaged in a business affected with a public national interest, and is subject to national regulation as such."

In *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 542, also relied upon by petitioner, the Court fully supports the position of Respondent herein and the decision is fully discussed by the lower court in its opinion. (R. 273.) An examination of the opinion in the *Schechter* case will disclose that the Supreme Court has not only distinguished most of the cases relied upon by petitioner herein, but effectively disposed of all of the contentions made by petitioner under this point.

In *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1, it appeared that the defendant received its raw materials in Pennsylvania from its subsidiary companies in other States, processed the raw materials in Pennsylvania and then transported them through its vast transportation facilities all over the country. The business of the defendant was likened to that of the stock

yards in *Stafford* v. *Wallace*, 258 U. S. 495, and it was held that the activities of the defendant in effect constituted a stream or flow in interstate commerce which subjected the defendant to the *National Labor Relations Act*.

Currin v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith*, 307 U. S. 38, and *United States* v. *Darby*, 312 U. S. 100, also relied upon by petitioner, were fully distinguished by the United States Circuit Court of Appeals in its opinion. (R. 272-273.)

We submit, therefore, that the judgment herein does not conflict with the decisions relied upon by petitioner herein, but merely conforms to the well settled constitutional limitations of the power of Congress over intrastate matters. The scope of the power of Congress to control interstate commerce must be considered in the light of our dual system of government.[19]

Petitioner contends that a program for the establishment of minimum prices for interstate milk cannot be effective if intrastate milk can be sold competitively without restriction, and in that connection, calls attention to the *dictum* of the Court below when it speculated as to the possible result upon the Order in view of the fact that the defendant was not subject to the regulation. There is not a *scintilla* of evidence in the record which in any wise indicates that the effective sanction of the order would fail because it did not

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[19] See *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 548, where the Court said at p. 548: "While these decisions related to the application of the Federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the Federal Power, and for all practical purposes we should have a completely centralized government."

embrace handlers of milk who were engaged entirely in intrastate transactions and were in no wise involved in the regulation.

Answering a similar argument of the Government in the *Schechter* case that if persons engaged in the poultry business in intrastate commerce were not made subject to the provisions of the Federal Code (N. R. A.), competition with those under the Code would suffer and that the cutting of prices would bring "about a demoralization of the price structure," the Supreme Court said at p. 549:

> "Similar conditions may be adduced in relation to other businesses. The argument of the Government proves too much. If the Federal Government may determine the wages and hours of employes in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employes, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of Federal control, the extent of the regulation of cost would be a question of discretion and not of power."

Suffice it to say that the State has jurisdiction and full plenary power to control the milk industry within its boundaries, and many States have undertaken that control.

Congress in enacting Section 10(i) of the Marketing Agreement Act of 1937, fully recognized the limitation of Federal authority in that field and expressly provided that in order to obtain uniformity in the formulation, administration and enforcement of Federal and State programs relating to the regulation of the handling of agricul-

tural commodities or products thereof that the Secretary of Agriculture may confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to co-operate with such authorities and to issue complementary orders to orders or other regulations issued by such State authorities, and further direct that the Secretary of Agriculture make available to State authorities the records and facilities of the Department of Agriculture and to accept and utilize with the consent of the State such State and local officers and employes as may be necessary.

So spoke Congress. Undoubtedly it recognized that there might be a difference in regulation in the milk industry which involved local intrastate commerce and that controlled by the Secretary of Agriculture under the Act. As to such intrastate commerce, Congress clearly did not intend to legislate, hence the provision for co-ordination between the State and Federal authorities.

Petitioner also relies upon *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, wherein the Court refused to construe the provisions of the Federal Trade Commission Act to read, "*unfair methods* of competition in (interstate) commerce" as though it meant "unfair methods of competition in any way affecting interstate commerce," because Congress had not so provided and the Courts could only enforce the law as written. Petitioner contends that the statute involved in the present case contains language omitted from the *Federal Trade Commission Act*. In the Federal Trade Commission Act Congress sought to regulate unfair methods of *competition* in interstate commerce, whereas in the Agricultural Marketing Agreement Act of 1937, Congress sought to regulate the price of certain commodities in interstate commerce. In the former, "unfair competition" was the gist of the evil sought to be regulated; in the latter, the matter of "competition" was definitely eliminated as a determining factor as to

whether the commodities were to be regulated or not when Congress intentionally deleted from the Act the words "in competition with" and re-enacted the Act with those words omitted.

Petitioner also contends that the ruling below is inconsistent with the familiar principle for which the *Shreveport* case stands. We have heretofore distinguished the *Shreveport* case and demonstrated that the Federal control applies only in the case of carriers who are engaged in *both interstate and intrastate transportation.*[20] The competitive discrimination against interstate rates as illustrated in the *Shreveport* case by a railroad engaged *both* in interstate and intrastate transportation has no application whatsoever to a situation where a handler of milk buys all of his milk within a State and sells it within the State, and where none of his activities partake of an interstate character other than that his milk might be in competition with milk which crosses State lines. There is hardly a single article produced or manufactured in common use which can be said not to be in competition with a similar article produced or manufactured across State lines.

To like effect is the quotation relied upon by petitioner from the dissenting opinion of Mr. Justice Cardozo in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 329. In that case it appears from the dissenting opinion that each of the complainants were engaged both in interstate and intrastate commerce and that the principal business in each case was in interstate commerce, and therefore subject to Federal control on the principle announced in the *Shreveport* case and cited in the dissenting opinion. Mr. Justice Cardozo, however, recognized that the principle announced had no application to purely intrastate transactions where it does not directly or intimately affect interstate commerce.

[20] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 38.

We submit that not a single case has been cited which holds that only one factual element is essential to subject a milk distributor whose operations are wholly intrastate in character to the Order, namely a showing that such milk distributor competes with handlers operating in the market who are subject to the regulation. As the United States Circuit Court of Appeals so aptly said in its opinion in this case—"to do so would be to subscribe to a view of causation which, as Justice Cardozo said in the *Schechter* case, *supra*, p. 554, 'would obliterate the distinction between what is national and what is local in the activities of commerce.'" (R. 274.)

5. We have shown that the decision of the Court below followed the settled law as to which there is no conflict. We submit that there is no showing in the record other than the statement of petitioner, in its petition, that the Order herein involved cannot operate unless uniformly applied to all handlers in the marketing area irrespective of whether they are subject to Federal control or not.

In answer to petitioner's statement, it suffices to say that under our dual form of government, as provided by the Constitution, the co-operation of the Federal Government and of the States is the only solution possible to any hiatus created by apparent disunity. This was clearly recognized by Congress when it enacted Section 10(i) of the Agricultural Marketing Agreement Act of 1937 and this situation cannot be changed except by amendment to the Constitution of the United States.

CONCLUSION.

It is respectfully submitted that because the question presented by the petition has been authoritatively an-

swered by both the legislature and the judiciary, the petition for certiorari to the United States Circuit Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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